

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)	PRELIMINARY ORDER
TO APPROPRIATE WATER NO. 95-9360)	
IN THE NAME OF TALL PINE)	
LAKEVIEW ESTATES, LLC)	
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On September 28, 2006, Tall Pine Lakeview Estates, LLC ("Tall Pine"), filed an application to appropriate water with the Idaho Department of Water Resources ("IDWR" or "Department"). IDWR assigned water right no 95-9360 to the application. IDWR published notice of the application on October 19 and 26, 2006. Application no. 95-9360 was protested by the following protestants: Max A. Palmer, Berniece J. Palmer, Josie Ehrlich, Karen Hayes, Cecil Hathaway, Kelsey Palmer, Kim Eadie, Anthony Venturino, James J. Boyes, Gerald J. Wiedenhoff, Cynthia M. Robinson, Lisa Palmer, John T. Montee, Edward M. Rollins, Darryl E. O'Sickey, Thomas H. Kosewic, Gary Harger, Lubertus Vanderbilt, Reka C. Schwarz, Melvin T. Schmidt, William W. Henry, Robert Finney, Clyde Zortman, Dane Hossley, and Kootenai Environmental Alliance.

On April 19, 2007, IDWR conducted a hearing for the protest. Mitchell Wright, a principal in Tall Pine, represented Tall Pine. The following protestants appeared representing themselves: Max A. Palmer, Berniece J. Palmer, Josie Ehrlich, Karen Hayes, Cecil Hathaway, Kim Eadie, Anthony Venturino, James J. Boyes, Gerald J. Wiedenhoff, Cynthia M. Robinson, Lisa Palmer, Edward M. and Marilyn Rollins, Darryl E. O'Sickey, Gary Harger, Lubertus Vanderbilt, Melvin T. Schmidt, Robert Finney, Clyde Zortman, Dane Hossley, and Barry Rosenberg for Kootenai Environmental Alliance. Kelsey Palmer, John T. Montee, Thomas H. Kosewic, Reka Schwarz, and William W. Henry did not appear at the hearing.

In item 3 of application no. 95-9360, which locates the proposed points of diversion, several groups of public lands survey information are listed. The groups of information described locations as follows:

Township 51N, Range 3W, Section 2, SW1/4,SE1/4,NW1/4 (Test Well No. 2)

Township 52N, Range 3W, Section 35, SW1/4,SW1/4,SE1/4 (Test Well No. 3)

In testimony, the applicant established that only two points of diversion are described in paragraph three of the application.

Following presentation of testimony and other evidence, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application to appropriate water no. 95-9360 proposes appropriation of water as follows:

Source:	Groundwater
Purpose of Use:	Municipal
Flow Rate:	0 12 cfs and 54 gpm
Period of Use:	Year Round
Point of Diversion:	
	Township 51N, Range 3W, Section 2, SWSENW ¹ (Test Well No. 2)
	Township 52N, Range 3W, Section 35, SWSWSE (Test Well No. 3)

Place of Use:

Township 51N, Range 3W, Section 2, NENW, SWNW, SENW
Township 52N, Range 3W, Section 35, SESW, SWSE, SESE

2. Application no. 95-9360 proposes municipal use of ground water for a 25-lot subdivision near Hayden Lake, Idaho. The subdivision is located on approximately 200 acres. The subdivision will be divided into large lots consistent with present local zoning. Tall Pine proposes a central water system delivered to the lots in the subdivision.

3. Use of water within the subdivision would be limited to one half acre of irrigation and in-house use of the water. Regulations of the Department of Environmental Quality require that a minimum of 54 gallons per minute (gpm) be provided to the subdivision.

4. Tall Pine constructed wells at the locations of the two points of diversion proposed by application no. 95-9360 in accordance with drinking water standards. In addition, Tall Pine also constructed two more wells, located in Section 35 of Township 52 N, Range 3W, according to drinking water standards. These two additional wells are referred to hereinafter as test wells nos. 4 and 5. Test wells nos. 4 and 5 were not included as proposed points of diversion in the application and could not be considered in this decision.

5. Exhibit 2 describes well no. 2 ("TP #2") and 3 ("TP #3"). The narrative in Exhibit 2 about well no. 2 states that a 24-hour pump test resulted in a sustained yield of 11 gallons per minute. The narrative in Exhibit 2 about well no. 3 states that a 24-hour pump test resulted in a sustained yield of 48 gallons per minute. Assuming no interference between the pumping wells if they were both pumped at the same time, the total sustained flow from both wells for 24 hours would be 59 gallons per minute.

¹ Public land survey descriptions in this decision without a fraction following a two alpha character descriptor are presumed to be followed by the fraction "1/4." In addition, all public land survey descriptions are presumed to be based on the Boise Meridian. All locations are in Kootenai County.

6 The application proposes diversion of water from granitic fractures that are confined by a shallower impervious strata. The confinement of the aquifer causes ground water to rise above the level where it is encountered. As a result, the aquifer(s) encountered is under artesian pressure.

7 The amount of water that is available from individual wells in the granitic substrate depends on the size of the fractures, and the degree to which the granite is weathered.

8 The directness of the relationship between the fractures is unknown.

9 Springs in the area emit from the ground and discharge water under artesian pressure to surface water streams. One such spring is located directly downhill from well no. 3 and is also in close proximity to test wells nos. 4 and 5.

10 Tall Pine attempted to submit a summary document prepared by a geologist summarily concluding there is sufficient water for the appropriation and that it would not injure other water users. The document did not contain any supporting facts or documentation. The hearing officer did not allow the document into evidence because the expert witness did not appear to present facts and be subject to cross examination. Tall Pine made an offer of proof of the document and it was identified as Exhibit no. 5.

11 Tall Pine did not submit evidence establishing the relationship of the proposed points of diversion and associated pumping with other existing water rights in the area.

12 Tall Pine did not submit evidence establishing the long-term water supply for the proposed development.

13 Idaho Independent Bank submitted documentation that it would support and provide financing for the project if the needed approvals are obtained.

14 The applicant has expended significant energy and funds in pursuing preliminary plat approval, and conducting other studies and approvals.

15 Water for homes is a reasonable use of water.

16 The development includes a portion of the drainage for Stump Creek, a tributary of Hayden Creek and Hayden Lake. Stump Creek is a valuable spawning habitat for cutthroat trout. Springs at the head of Stump Creek provide water for the flows in Stump Creek. The drilling of wells could impact and reduce the flows of Stump Creek that support cutthroat trout.

17 The applicant proposes uses of water that are within the acceptable limitations of domestic use.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. The applicant bears the ultimate burden of proof regarding all the factors set forth in Idaho Code § 42-203A.

3. The applicant bore the burden of proving that the proposed use of water would not reduce the quantity of water under existing water rights. The applicant failed to satisfy its burden of proof.

4. The applicant bore the burden of showing that the water supply was sufficient for the purpose sought. The applicant did not satisfy its burden of proof.

5. The applicant established it has sufficient financial resources to build the project.

6. The applicant established the application was not filed for purposes of delay, speculation, or in bad faith.

7. The applicant did not establish that its proposed use would not impact and reduce the flows of water in Stump Creek, a valuable cutthroat fishery. As a result, the applicant did not satisfy its burden of proof regarding the local public interest.

8. The applicant established that the proposed use would be consistent with the principles of conservation of the waters of the State of Idaho.

ORDER

IT IS HEREBY ORDERED that Application to Appropriate Water #95-9360 is **Denied** without prejudice.

IT IS FURTHER ORDERED that the following must be completed before the Department will process another application to appropriate water for this project:

1. The applicant must file another application to appropriate water, describing all of the points of diversion from which the applicant proposes to divert water.

2. Prior to the publication of notice of the application by the Department, the applicant must complete a pumping test of the constructed wells that is proposed, performed, and analyzed by a licensed professional engineer or a licensed professional geologist. In completing the pumping test, the applicant must complete the following:

a. Submit a proposal for well pump testing and monitoring to the Department and the protestants to this contested case. The proposal must identify both wells and springs that will be monitored during the duration of the test. All wells proposed for production must be simultaneously pumped. The protestants to this contested case must have an opportunity to suggest changes to the proposed pump testing and monitoring. The Department must approve any proposal for well pump testing and monitoring. The applicant must notify the Department and the protestants to this contested case at least one week in advance of the date and time of the testing and monitoring.

b. Complete the pump test and initial monitoring, and analyze the data of the pump test in a written scientific report. The report must contain specific scientific conclusions drawn from the test.

c. Submit the report to the Department and all protestants to this contested case. The protestants to this contested case and the Department shall have a reasonable time to read the report and comment on the data, the methods of analysis, and the conclusions of the report. The Department may require additional data gathering and studies before publication of notice of the application.

Dated this 2nd day of August, 2007



Gary Spackman
Hearing Officer